

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04/08/2004

Coram

The Hon'ble Mr. Justice K.GOVINDARAJAN
and
The Hon'ble Mr. Justice N.KANNADASAN

O.S.A.No.201 of 1998
and
O.S.A.Nos.107, 108 of 1999 and OSA.No.201 of 1998

M/s.Hindustan Construction Co.
Limited, Construction House,
Lalchand Hirachand Marg,
Ballard Estate,
Bombay-400 038. .. Appellant

-Vs-

1.Tamil Nadu Electricity Board,
rep., by its Secretary,
800, Anna Salai,
Chennai-2.

2.Mr.P.K.Vedanayagam, B.E.,
Joint Arbitrator,
Pallavi Apartments,
Flat No.3, F/47,
Anna Nagar,
Chennai-102.

3.Mr.A.Mohanakrishnan, B.E.,
Joint Arbitrator,
No.48, AK Block,
Anna Nagar,
Chennai-40. .. Respondents

This Appeal is preferred against the decree and judgment of this Court dated 30.4.1998 in O.P.No.368 of 1994.

!For Appellant : Mr.V.Ramachandran,
Senior Counsel for
Mrs.Anita Sumanth

^For Respondent-1 : Mr.N.C.Ramesh

For Respondent-2 : No Appearance

For Respondent-3 : No Appearance

O.S.A.Nos.107 and 108 of 1999

Tamil Nadu Electricity Board
rep., by its Secretary,
Tamil Nadu Electricity Board,
No.800, Anna Salai,
Chennai-600 002. .. Appellant in both the appeals

Vs.

1)Sri A.Mohanakrishnan,B.E.,
Joint Arbitrator,
48th Street, Anna Nagar,
Chennai-600 040.

2)M/s.Hindustan Construction
Company Ltd.,
Construction House,
Walchand Hirachand Marg,
Bellard Estate,
Mumbai-400 038. .. Respondents in both the appeals

These Appeals are preferred against the decree and judgment of this
Court dated 30.4.1998 in O.P.Nos.715 of 1993 and 368 of 1994.

For Appellant in both
the appeals: Mr.N.C.Ramesh

For Respondent-1
in both the appeals: No Appearance

For Respondent-2 : Mr.K.Ramachandran,
in both the appeals Senior Counsel
for Mrs.Anita Sumanth

:J U D G M E N T

N. KANNADASAN, J.

The appellant in OSA No.201 of 1998 was awarded a contract by
the first respondent and the contract agreement provides a period of 36 months
to complete the work from the date of handing over the site. The ranks of the
parties are given as set out in OSA No.201 of 1998 for convenience. Even
though the site was handed over to the appellant/ contractor on 1.6.1979, the
work was not completed within the stipulated period. It is contended by the

appellant that they could not complete the work due to the default on the part of the first respondent and due to the delay on the part of the first respondent on several counts, the appellant suffered a huge loss. In view of the delay on the part of the first respondent, the appellant was constrained to seek extension of time to complete the contract and the period was extended from time to time. Under the said circumstances, the appellant has invoked the arbitration clause. The Arbitrators, after considering the various records and documents made available before them and after giving opportunity to examine the witnesses and after hearing the arguments and submissions of both the parties, have passed an award accepting the claim of the appellant with the respect to the claim Nos.(a),(b),(c),(d) and (e) and quantified the amount therein payable by the first respondent at Rs.2,01,13,914.00 with interest at 11% from 22.11.1989 till the date of payment or decree whichever is earlier. Even though a counter-claim was made as against the appellant herein by the first respondent, the same was rejected by the Arbitrators. The first respondent has filed a petition in O.P.No.368 of 1994 to set aside the award under Section 30 of the Arbitration Act and the Arbitrators have filed a petition in O.P.No.715 of 1993 under Section 14(2) of the Arbitration Act, 1940, seeking permission to file the award dated 29.3.1993 before the Court. The learned Judge by a common order dated 30.4.1998 has set aside the award in respect of four claims viz., claim Nos.(a),(b),(c) and (e) but upheld the award in respect of claim No.(d), but however, restricted the period for which the interest is payable as from the date of the award till the date of payment. Aggrieved against the said order of the learned Judge, the appellant filed OSA No.201 of 1998 as against O.P.No.368 of 1994 and the first respondent filed two appeals in OSA Nos.107 and 108 of 1999 against O.P.Nos.715 of 1993 and 368 of 1994 respectively.

3. The learned Senior Counsel Mr.K.Ramachandran appearing for the appellant contended that inasmuch as the award passed by the Arbitrators is a non-speaking award and there are no errors apparent on the face of the award or documents accompanying it, the same should not have been set aside either in part or in full. In this connection, the learned Senior Counsel cited various decisions of the Supreme Court to the effect that the Courts have no powers to interfere with a nonspeaking award. The learned Senior Counsel further contended that the learned Judge has erroneously proceeded with the matter that the Arbitrators have exceeded their jurisdiction even though they have acted within the terms of Arbitration Clause. The learned Senior Counsel further contended that inasmuch as the learned Judge has overlooked the fact that the Arbitrators have chosen one out of the two possible views and as such, their decision ought not to have been set aside as erroneous. The learned Senior Counsel further contended that inasmuch as the Supreme Court has remitted the matter for fresh consideration and discretion is left to the Arbitrators to decide the arbitrability of the issues involved and accordingly when the Arbitrators have decided that the issues involved therein are arbitrable and passed an award, the same ought to have been accepted, unless contrary is proved. He further argued with regard to the nature of the claim made and the loss suffered by the contractor/appellant and contended that the appellant is entitled to maintain the claim as per the

various terms of the agreement. According to him, the restriction in respect of the period for payment of interest from the date of award instead of from the date of reference is without any valid reasons and contrary to law.

4. Per contra, Mr.N.C.Ramesh, learned counsel for the first respondent contended that the appeal itself is not maintainable in view of the fact that the appellant has chosen to file only one appeal as against O.P.No.368 of 1994, but failed to challenge the order in O.P.No.7 15 of 1993. On merits, the learned counsel for the first respondent contended that inasmuch as the tender specification requires the contractor to inspect the proposed work site with regard to the location and satisfy about the quality and availability of materials, adequacy and nature of access to sites and other facilities, the first respondent cannot be found fault after completion of the work. After the execution of the agreement, the appellant is not entitled to claim further amount as if there was a change in location of tailrace gate shaft, extra expenses on account of non-availability of approach roads and idling charges for the non-use of the machineries/equipments for the excavation of adit 3 head race tunnel (HRT). On the basis of the specific prohibition contained in the agreement, the learned counsel contended that the appellant cannot make any claim for the extra payment. It is further contended that the award in respect of claim No.(d) viz., expenses incurred due to the delay in the execution of work is not justified and the order of the learned Judge in confirming the award on this claim is not sustainable in law on the ground that the contract is a lumpsum contract and for the extended period the escalation charges were paid to the contractor. The learned counsel further contended that the issues raised by the contractor before the Arbitrators are not arbitrable under the terms of the contract and as such, the appellant is not entitled for any relief as claimed.

5. We have considered the rival contentions of either parties.

6. The points for determination that arise in this appeal are:-

- a) Whether the appeal filed by the appellant against O.P.No.368 of 1994 alone sustainable in law without filing appeal against the order in O.P.No.715 of 1993?
- b) Whether the learned Judge is correct in setting aside the award in respect of four claims except claim No.(d)?
- c) Whether the learned Judge is correct in restricting the period for which the interest is payable viz., from the date of the award till the date of payment instead of from the date of reference?
- d) Whether the learned Judge is correct in rejecting the counter claim of the first respondent?

7. Before we proceed with the matter with regard to various contentions on either side, we propose to deal with the preliminary objection raised by the learned counsel for the first respondent regarding maintainability.

8. The learned counsel for the first respondent contended

that the present appeal is filed as against the judgment and decree in O.P.No.368 of 1994 dated 30.4.1998 only, without filing an appeal as against the judgment and decree in O.P.No.715 of 1993 and as such, the appeal is liable to be dismissed on the ground of res judicata. In support of the above contention, the learned counsel relied upon the various decisions which are dealt with in the succeeding paragraphs.

9. Per contra, the learned senior counsel for the appellant contended that though there are two decrees, the learned Judge has dealt with both the original petitions by a common judgment and contended that one appeal as against the judgment and decree in O.P.No.368 of 1994 is maintainable. The various decisions cited by both the learned counsel are dealt with as hereunder:-

The learned counsel for the first respondent relied upon the decision of the Supreme Court in K.V.George vs. Secretary to Government, Water and Power Department, Trivandrum (AIR 1990 SC 53) to the effect that Section 11 of the Civil Procedure Code is applicable to the cases arising under the Arbitration Act and as such contended that the appeal is not maintainable. In the above decision, it is held that the principles of constructive res judicata is applicable to arbitration proceedings. But factually the said case is to be distinguishable. It is to be seen that the above said decision arose out of the claim made by a contractor, raising certain disputes in the first claim petition in pursuance of termination of the contract, chosen to file a second claim petition subsequently. In the said circumstances, the Supreme Court has held that the principles of res judicata is applicable and the second claim petition is not maintainable. So the said decision is not applicable to the present case.

10. The decision of the Apex Court in Ram Prakash vs. Charan Kaur (1997 (9) SCC 543) relied on by the learned counsel for the first respondent has no application for the case on hand in view of the fact that the above Special Leave Petition arose out of two separate suits filed by the petitioner as well as the respondent claiming damages against each other and the petitioner's suit having been dismissed and the order having become final, the respondent has chosen to file one appeal only against the judgment and decree, dismissing the suit filed by him and the said second appeal is barred by res judicata.

11. Similarly, the decision relied upon by the learned counsel for the first respondent in Premier Tyres Limited vs. The Kerala State Road Transport Corporation (AIR 1993 SC 1202) has no application for the present case, since two suits were filed by the plaintiff as well as the defendant and one appeal alone was filed as against the decree passed in respect of one suit.

12. Likewise, the decision cited by the learned counsel for the first respondent in Banarsi vs. Ram Phal (2003 (9) SCC 606) has no application in the instant case for the reasons stated above.

13. The learned counsel for the first respondent placed

reliance upon the decision of the Supreme Court in Venkateswara Prabhu vs. Krishna Prabhu (AIR 1977 SC 1268) and contended that the appeal is liable to be dismissed on the ground of res judicata. The abovesaid decision was rendered in the circumstances wherein a decree was passed in a money suit and a separate decree was passed with regard to a partition suit and one appeal alone was filed before the Apex Court as against the decree granted in the partition suit and the same was dismissed as res judicata. Even though the common judgment was rendered by the High Court therein even in form, the judgment in the appeal relating to the money suit was separate from the rest of the judgment. It was further observed therein that there were two separate decrees. The Apex Court has also taken note of the fact that if the doctrine of res judicata is not applied to a particular case and if two inconsistent decrees will come into existence, it is not correct to allow such a situation to exist. In the very same decision, the Apex Court has approved the ratio decidendi of the principle laid down in the earlier case in Narhari vs. Shankar ((1950) 1 SCR 754)) to the effect that wherein if two decrees in substance are one, one appeal is sufficient. The relevant passage of the judgment in Venkateswara Prabhu's case is extracted here-under:-

"10. Narhari vs. Shankar ((1950) 1 SCR 754)) is no doubt the judgment of the Supreme Court of India, although it was, if one may so put it, "the Hyderabad Wing" of it in a transitional period when a learned Judge of this Court, Mr. Justice Mehr Chand Mahajan, presided over a bench of which the other two Members were formerly Members of His Exalted Highness the Nizam's Judicial Committee. Technically, however, it was this Court's judgment. In that case, Naik, J. had followed a decision of the Judicial Committee of the Hyderabad State and held that when there was only one suit and the appeals had been disposed of by the same judgment, it was not necessary to file two separate appeals. It elaborated the ratio of the decision as follows (at p.757-758):

"It is now well settled that where there has been one trial, one finding and one decision, there need not be two appeals even though two decrees may have been drawn up. As has been observed by Tek Chand J. in his learned judgment in Mst. Lachhmi vs. Mst. Bhulli, AIR 1927 Lah 289 (FB) mentioned above the determining factor is not the decree but the matter in controversy. As he puts it later in his judgment, the estoppel is not created by the decree but it can only be created by the judgment. The question of res judicata arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of res judicata does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of res judicata. The same cannot remain effective just because it was appealed against with a different number or a copy of it was attached to a different appeal. The two decrees in substance are one".

14. In Pappammal vs. Meenammal (ILR (1943) Mad 235 =)1943) 1 Mad LJ 1 = AIR 1943 Mad 139 (FB) the Bench which made reference to the Full Bench, had to consider this question. They referred to the decision in (1906) 16 Mad LJ 63 = ILR 29 Mad 333, and pointed out that Full Bench had clearly indicated the principle to apply in the circumstances of the case that where

the object of the appeal being in substance, if not in form, is to get rid of the very adjudication which is put forward as constituting res judicata that the adjudication should not be held to bar the appeal. The Bench also added the qualification that the decision must have been rendered at the same time and the suits must have been tried together but it was not material that they must be cross-suits. The Bench then referred to the decision in Ramaswami Chetti vs. Karuppan Chetti, 29 Mad LJ 551 = (AIR 1916 Mad 1133) which followed the Full Bench decision in (1906) 16 Mad LJ 63 = ILR 29 Mad 333, and held that that decision is not to be confined to cross suits only but that it is equally applicable to suits between the same parties in which a common question is raised and decided and an appeal is preferred in only one of the suits.

15. In the decision in Lakshi Ammal vs. Official Receiver, Tinnevely, 67 Mad LJ 364 = (AIR 1935 Mad 214), Beasley, C.J., referred to the sentence in the Full Bench judgment to the following effect. "It would lead to startling results if we were to hold that an appellate tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts but in a case other than the case under appeal, had given a decision which had not been appealed against, at the same time as the decision in the case under appeal". And held that the doctrine of res judicata had no application

when the very object of the appeal was to get rid of the decision pleaded in bar. In Narayanaswami Iyer vs. Sevadappa Gounder, (1941) 2 Mad LJ 932 = (AIR 1942 Mad 226), the decision LJ 364 = (AIR 1935 Mad 214) was followed.

16. Admittedly, in the instant case, one Original Petition was filed by the first respondent herein to set aside the award passed by the Arbitrators whereas the other Original Petition was filed by the Arbitrators only seeking permission to file the award in the Court. Had the first respondent herein not filed O.P.No.368 of 1994 to set aside the award, the benefit of the award passed by the Arbitrators would be available to the appellant herein. It is only in the petition filed by the first respondent herein, the learned Judge has set aside the claims awarded by the Arbitrators in respect of four headings out of five headings.

17. A perusal of the decree arose out of the common judgment by the learned Judge in both the original petitions discloses that the decree proceeds as if it is a common decree. The relevant portion of the decree is extracted hereunder:-

"In the High Court of Judicature at Madras
(Ordinary Original Civil Jurisdiction)
Thursday the 30th day of April 1998
The Hon'ble Mr. Justice R.JAYASIMHA BABU
Orgl. Petn.No.715 of 1993
and
Orgl. Petn.No.368 of 1994
In the matter of Indian Arbitration
Act, 1940; and

In the matter of Arbitration in the disputes/claims arising out of and relating to the work of construction of Access Tunnel, cable shafts, Water Conductor system and power House Cavern etc. of Specification No.C 1261 of Kadamparai pumped storage Hydro Electric project for Tamil Nadu Electricity Board; and

In the matter of Arbitration Award dated 29.3.1993.

A.Mohana Krishnan.. Petitioner/Arbitrator
vs.

1.The Hindustan Construction Co.Ltd.,
Construction House,
5 Lalchand Hirachand Marg,
Ballard Estates, Bombay-38.
2.The Tamil Nadu Electricity Board,
Mount Road, Thro' Chief Engineer
HEP, Madras-2. .. Respondents

Original Petition praying that this Court be pleased to (a) permit the petitioner to file the Award dated 29.3.1993, in Court (b) issue notice to Respondents.

.....

1. That the Tamil Nadu Electricity Board Mount Road the second respondent in O.P.No.715 of 1993 do pay to the Hindustan Constructions Company Limited the first respondent in O.P.No.715 of 1993 a sum of Rs.1,56,08,879.12/- (Rupees one crore fifty six lakhs eight thousand eight hundred and seventy nine and paise twelve only) with further interest at the rate of 11% p.a. on the sum of Rs.1,00,09,105/- (Rupees one crore nine thousand one hundred and five only) from this date till the date of realisation."
2. That the award made by the Arbitrators under the heads claimed (a) (b) (c) and (e) of the claims made by the contractor the first respondent in both petitions be and are hereby set aside.
3. That the interest awarded by the Arbitrators for the period from the date of reference to the date of award be and is hereby set aside as being beyond their jurisdiction in view of clause 13 of section II of the contract; and
4. That the parties hereto shall bear their respective costs of these proceedings;"

18. The above decree is drafted considering the fact that the learned Judge dealt with the issues in common and a common judgment is passed. Even in the above appeal any order is passed as against the decree in O.P.No.368 of 1994, it cannot be construed that an another inconsistent decree would be available on record.

19. A Division Bench of the Patna High Court in Union of India vs. B.C.Basu (AIR 1983 Patna 25) held that the right of appeal conferred by the legislature cannot be lightly defeated. It is further observed therein that the mere drawing of a decree will not take away the right of appeal against the order.

20. Before 1940, the law relating to arbitration was mainly contained in the Second Schedule to the Code of Civil Procedure, which was repealed by the Arbitration Act of 1940, a self-contained code in the matter of arbitration. The scheme of the Act is to divide arbitration into three classes. The first consists of arbitration without intervention of a Court and is contained in Chap.II of the Act which has 17 sections from S.3 to S.19. The second consists of arbitration with intervention of a Court where there is no suit pending, which is in Chap.III of the Act, and there is only one section (S.20) therein, as sub-s.(5) thereof applies the other provisions contained in the Act to this type of arbitration also so far as they can be made applicable. The third type of arbitration is contained in Chap.IV, namely, arbitration in suits. This chapter contains five sections, and S.25 thereof applies the other provisions of the Act so far as they can be made applicable.

21. Chapter II makes various provisions with respect to arbitrations of the first type. Reference may be made to a few which are material for our purpose. Sec.6 lays down that the authority of an appointed Arbitrator shall not be revocable by death of any party, but it shall not affect the operation of any law by virtue of which any right of action is extinguished by the death of a person. Sec.8 gives power to Court to appoint an Arbitrator or umpire in certain circumstances. Sec.11 gives power to Court to remove an Arbitrator or umpire in certain circumstances and Sec.12 gives consequential power to Court to appoint persons to fill vacancies which may have arisen. Sec.13 provides for powers of the Arbitrators and Sec.14 provides for the award to be signed and filed. When the award is filed the Court has to give notice to the parties of the filing of the award under Sec.14(2). Under Sec.15, the Court is given power to modify or correct an award and under Sec.16 the Court can remit the award for reconsideration. Sec.17 provides for judgment in terms of the award and reads thus:-
"Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award."

Sec.19 gives power to the Court to supersede the arbitration agreement in certain circumstances.

22. This analysis of the relevant provisions of the Act contained in Chap.II which apply mutatis mutandis to arbitrations of the other two types shows that the Court has to pronounce judgment in terms of the award

if it sees no cause to remit the award or any of the matters referred to arbitration for reconsideration, or to set aside the award. The Court has to wait for the time given to the parties to make an application for setting aside the award and where such an application has been made, the Court has to decide it first and if it rejects it, the Court proceeds to pronounce judgment according to the award. It is clear, therefore, from Sec.17 that an application to set aside the award is contemplated therein and it is only when no such application has been made within the time allowed or if such an application has been filed and rejected, the Court proceeds to pronounce judgment in terms of the award.

23. The Act, therefore, contemplates the making of an application to set aside an award and the grounds on which such an application can be made are to be found in Sec.30. The grounds on which an application can be made for setting aside the award are--

(a) that an Arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec.35;

(c) that an award has been improperly procured or is otherwise invalid. These are the only grounds on which an award can be set aside under Sec.30 on the application, if any, filed by the party aggrieved.

24. We may also refer to Sec.32 which lays down as follows:-

"notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act."

25. It is clear, therefore, from the scheme of the Act that if a party wants an award to be set aside on any of the grounds mentioned in S.30 it must apply within 30 days of the date of service of notice of filing of the award as provided in Art.158 of the Limitation Act. If no such application is made the award cannot be set aside even on any of the grounds specified in Sec.30 of the Act. It may be noted that there is no special form prescribed for making such an application (emphasis supplied by us).

26. We draw support for the above principle in the decision rendered by the Apex Court in *Madan Lal vs. Sundar Lal* (AIR 1967 SC 1233). In the light of the above, it is clear that the Act does not envisage any application to pass a decree in terms of an award at the instance or whose favour an award has been made. For the reasons stated above, we hold that the above appeal which is filed as against the judgment and decree in O.P.No.368 of 1994 which came to be passed on an application filed by the first respondent to set aside the award, is maintainable in law and it is not hit by the principles of *res judicata*.

27. To deal with the further contentions urged by the learned counsel for both the parties, the following facts are necessary:

The appellant herein was awarded a contract by the first respondent and the contract agreement provides a period of 36 months to complete the work from the date of handing over the site. Even though the site was handed over to the contractor on 1.6.1979, the work was not completed within the stipulated period and the period of contract was extended from time to time at the request of the contractor and the work was ultimately completed on 31.3.1988.

28. The value of the contract was fixed at Rs.10,24,82,900/-.

The agreement provides for an escalation clause and the said clause is applicable even in respect of the extended period. In view of the fact that the agreement has provided escalation clause, the contractor was paid in addition to the sum of Rs.10,24,82,900/-, a further sum of Rs.4,43,47,411/- towards escalation and a sum of Rs.3,35,50,041/- towards the cost of additional work, in all totalling to Rs.17,78,97,452/-.

29. The appellant has made a claim for a further sum of Rs.6,92,16,645.60 on 5.9.1989 which was later on scaled down to Rs.5,58,14,464.56. The award was passed in respect of five claims out of six claims as detailed here-under:-

Head of Claim Amounts Revised Amount
Originally claim Awarded by
claimed Arbitrators

Rs. Rs. Rs.

a.Change in

location

of tailrace

gate shaft

from contractual

location 49,22,782.70 40,20,763.20 30,92,531.00

b.Excavation of

adit 3 head

race

Tunnel (HRT) 38,02,870.36 30,83,766.85 17,08,759.00

c.Construction

of HRT Gate

Shaft 2,19,152.74 1,17,046.05 1,07,046.00

d.Extra expenses

incurred and/or

losses suffered

by us due to

delay in

execution of

works of

construction of

Access tunnel,
cable shafts,
water conductor,
systems and power
house cavern etc.
for Kadambarai
Pumped Storage
Hydro Electric
project against
Specification
No.C.1261 2,60,47,094.46 2,29,76,911.83 1,00,09,105.00

e.Revision in
the rate of
works 2,67,33,356.95 2,26,82,621.63 51,96,473.00

f.Revision in
escalation
components 75,02,388.39 28,34,382.00 Nil

Total 6,92,16,645.60 5,58,14,464.56 2,01,13,014.00

Since the learned Judge has extracted the relevant clauses contained in the contract, we do not propose to extract the said clauses. We shall deal with the claim and counter claim of the respective parties in respect of each claims as set out here-under:-

Claim(a): Change in location of tailrace gate shaft from contractual location:

The appellant has made a claim under this heading on the ground that they have incurred extra expenditure due to the change of location as directed by the first respondent. With regard to the change in location, Section III Clause 6.3.4 in the contract specifically enables the first respondent to deviate, alter or make any additions in respect of the work which was awarded. The above clause makes it clear that the contractor shall not claim any compensation in respect of any deviations or alterations. The said clause also proceeds to the effect that if any particular work which is omitted from the specification and if the contractor is directed to execute the additional work, the contractor is entitled for the payment in respect of the additional work it was ordered to execute. Admittedly, in the case on hand, the claim made by the contractor is only towards the alleged loss sustained by it in respect of change of location which is not permissible in law. Inasmuch as the very same clause sets out a specific prohibition against claim for any extra payment for additional work other than the schedule of rates, to which alone the contractor is entitled to, the claim of the appellant for an enhanced amount is not permissible as per the terms of the contract. Since the Arbitrators have exceeded in their jurisdiction in awarding the amount under claim(a) which is specifically prohibited as per the terms of the contract, we concur with the order of the learned Judge wherein the award in respect of the above claim is set aside.

Claim(b): Excavation of adit 3 head race Tunnel (HRT):

The appellant has claimed for the payment of extra expenses on account of non-availability of approach roads, additional expenses on account of tunnelling in Adit-3, extra expenses for construction of bypass Adit, extra expenses for the construction of masonry-cum-RCC wall and subsequent dismantling by control blasting; loss on account of idling and non-use of the machinery/equipment and extra expenses on account of non-availability of access road upto the top of Suge shaft. In this regard, Section-III Clause 6.7.3(ii)(c) categorically proceeds to the effect that the contractor is not entitled for any additional allowance other than the price indicated in the schedule to the terms of the contract in respect of excavation of all classes of tunnel. Similarly, Clause 6.6.2(i) in Section-III, it is clearly indicated that the Board will not be responsible for any delay in the formation of access roads and the contractor will not be eligible for any claims on account of such delay. Section-III 6.4.2(vii) specifically proceeds to the effect that if the contractor is of the opinion that any additional Adit or construction of shafts are necessary for speedy execution of the work, it is open to them to do so for which no extra payment for excavation or plugging or filling will be payable. In the light of the abovesaid specific clauses prohibiting the payment of additional amount claimed, the Arbitrators have exceeded in their jurisdiction while passing award in respect of the above claim and as such, we concur with the reasoning of the learned Judge in setting aside the above claim.

Claim(c):-Construction of HRT Gate Shaft:

The claim under this heading is made by the appellant on the ground that the location of the head race tunnel gate shaft was changed from its contractual location and it requires additional work and extra time for the excavation of the shaft on account of the change of location which resulted in loss on account of idling and non-use of the machinery. As dealt with already, with regard to claim(a), the relevant terms of the contract specifically prohibits for claiming extra amount on this account and as such, the Arbitrators have exceeded in their jurisdiction in passing the award and the learned Judge has rightly held that the appellant is not entitled to maintain the claim.

Claim(d): Extra expenses incurred and/or losses suffered due to delay in execution of works of construction of Access tunnel, cable shafts, water conductor, systems and power house cavern etc., for Kadambarai Pumped Storage Hydro Electric project against Specification No.C.1261:

The appellant while making claim under the above heading has also claimed interest for the delay in payment of bill. As per the terms of the agreement, the first respondent is expected to adhere to several obligations within the stipulated time. The appellant was able to substantiate before the Arbitrators that there was delay on the part of the first respondent in fulfilling its obligations within the stipulated time, which fact was taken note of by the learned Judge also. The claim made by the appellant is on account of the delay on the part of the first respondent for which the amount of compensation was ordered to be paid. Even though the first respondent makes an attempt to rely upon Clause-20 Section-II of the contract which proceeds to the effect that any breach or non-observance on the

part of the first respondent will entitle the contractor for compensation or damage to be fixed by the Engineer of the first respondent, the appellant was constrained to make a claim in this regard since they were not adequately compensated for the actual delay caused by the first respondent Board. Even though the learned counsel for the first respondent contended that extension of time was granted to the appellant only on their request, that does not prohibit the appellant to claim compensation if the delay is on the part of the first respondent Board. The Arbitrators, taking note of the fact that due to the delay caused, the appellant has incurred a loss and as such, the compensation was arrived at by them. The learned Judge while dealing with the above claim has given a finding that the amount claimed by the appellant by way of interest to the tune of Rs.48,11,655.59 on account of delay in the payment of bills was not permissible having regard to the recital contained in Clause-13 of Section-II of the contract agreement. Similarly, the learned Judge has rendered a finding that the contractor is not entitled for idling charges towards machinery and under utilisation. However, the learned Judge while discussing about the total quantum under this heading in paragraph-56 of the judgment has found that even if the amount under this heading viz., the claim towards interest and escalation charges for idling of machinery and under utilisation are excluded from the claim made by the appellant, the balance works out to Rs.1,28,07,302.36 and upheld the award of the Arbitrator which is a lesser than the above amount, viz., Rs.1,00,09,105.00.

30. A perusal of Clause-13 Section-II which deals with the payment of interest on money due to the contractor clearly proceeds to the effect that the contractor is not entitled for interest towards arrears or any balance of payment or final settlement of his accounts, to be found due to him. The learned Judge proceeds on the footing that the payment to which the appellant is entitled is only a payment towards arrears and as such, they are not entitled for interest. With due respect to the learned Judge, we do not agree with the above reasoning. The present claim of the appellant with regard to the interest is not relatable to the arrears in payment of any balance or final settlement of his accounts, but however, it is on account of loss incurred by the contractor due to the delay which is attributable on the part of the first respondent. In view of the fact that the above claim is not towards any arrears or balance of any payment on account of final settlement of bills but with regard to a specific claim which arose due to the delay on the part of the first respondent in discharging their obligation, the appellant is liable for compensation including interest. Even though we do not concur with the views of the learned Judge that the appellant is not entitled to claim interest, we do not propose to alter or interfere with the amount quantified by the Arbitrators, since the appellant has not raised any specific ground with regard to the order of the learned Judge in restricting the above claim excluding the interest thereof. Even though the learned counsel for the first respondent strenuously contended that the award of the Arbitrators as well as the order of the learned Judge in accepting the claim of the appellant under this heading is liable to be set aside, inasmuch as the first respondent has not made out a case of misconduct or want of jurisdiction or bias on the part of the Arbitrators, we are not inclined to set aside the order in respect of the above claim. The Apex Court in its decision rendered in *Trustees of the Port of Madras vs. Engineering Constructions Corporation*

Limited ((1995) 5 SCC 531), after referring to various earlier decisions, held that the finding of the learned Umpire therein which came to be passed after perusal of the relevant materials and as such, the High Court ought not to have interfered with the said findings and if it so, it would amount to re-appraisal of the evidence/materials before the learned Umpire.

31. In the light of the above decision, we do not propose to interfere with the award of the Arbitrators even with regard to the above claim concurring with the views of the learned Judge, which would otherwise amount to appraisal of evidence.

Claim(e): Revision in the rate of works:

As regards the above claim, the Arbitrators have chosen to accept the claim of the appellant with regard to the revision of rates as claimed by them. The Arbitrators have overlooked the fact that the contract is a lumpsum contract and as per the terms of contract, specific clause is provided for escalation of prices and admittedly the contractor was paid the escalation in cost in respect of the work done during the period of extension apart from the amount payable for the additional work necessitated in respect of alteration, addition or deviation. However, the appellant has chosen to claim a further amount which is nothing but a revision of rates which is specifically prohibited under the relevant terms of the contract viz., clause 6.7.3 of Sec.III and clause 6.3.2(i) of Sec.I. Hence, we agree with the reasoning of the learned Judge in setting aside the award passed by the Arbitrators under this claim.

32. The learned Judge while dealing with the claim of interest awarded by the Arbitrators from the date of the claim, restricted the period for which the appellant is entitled viz., from the date of award till the date of payment. In this regard, the learned Judge has relied upon Clause-13 of Section-II of the contract. The learned Judge has also placed reliance upon Clause-20 Section-II and concluded that even though extension of time was granted by the Engineer, he has not decided the actual compensation payable to the appellant/contractor which decision was arrived at only at the time of passing the award, and as such, the quantum which could be termed as a 'balance' as contemplated under Clause-13 of Section-II and accordingly held that the appellant is not entitled for the interest from the date of claim but only from the date of the award. In this connection, a perusal of Clause-13 of Section-II of the contract agreement will make the position clear which is extracted here-under:-

"Clause-13 of Section-II-Interest on money due to the contractor : No omission by the Engineer to pay the amount due upon certificates shall vitiate or make void the contract nor shall the contractor be entitled to interest, upon any guarantee fund or payments in arrears nor upon any balance which may, on the final settlement of his accounts, be found due to him".

A reading of the above clause makes it clear that it would be applicable only in respect of arrears of guarantee fund or payment in arrears; and balance amount in final settlement. Admittedly, in the case on hand, the appellant was entitled for compensation in terms of Clause-20 of Section-II which deals with the obligations on the part of the first respondent Board due to breach

or non-observance which resulted in additional expenses to the appellant herein. The said clause is extracted here-under:-

"20.0 BREACH ON THE PART OF PURCHASER NOT TO ANNUL CONTRACT:

No breach or non-observance on the part of the purchaser of any of the agreements herein contained shall annul this contract or discharge the contractor from the observance and performance thereof or of any part thereof, but compensation of damage (if any) shall be made to the contractor or at the option of the Engineer an extension of time given to the contract in respect of such breach or non-observance by the purchaser such compensation or extension of time to be fixed by the Engineer."

A perusal of the above clause clearly provides for the payment of compensation determined by the Engineer. It is only on failure on the part of the Engineer to determine the said compensation, the appellant was constrained to make a claim by resorting to arbitration proceedings. Had the Engineer determined the amount of compensation immediately after the completion of the contract or on receipt of the request from the contractor/appellant, there would not be any further loss including on account of interest. Hence, the claim of the contractor should necessarily date back to the date on which the claim was made, in which event it includes interest.

33. As regards the question of awarding interest, the Apex Court in its decision rendered in *M/s.Hind Builders vs. Union of India* (AIR 1990 SC 1340) after considering the various earlier decisions has held as follows:-

"That apart, on merits also the contention raised that post-award interest has been declined by the High Court is not correct. The contention overlooks the course of pleadings between the parties. The arbitrators had, in the annexure to the award, computed interest from 5.10.1982 to 26.3.1984 i.e. from the date of the termination of the contract till the date of the award and, in the award, had granted interest on the amount awarded from the date of award till the date of decree or payment. A point had been raised before the High Court in the memo of objections that the arbitrators had erred in awarding interest in the manner mentioned in the award but the objection urged by the Union before the learned single Judge was different one viz., that the arbitrators ought not to have granted interest for the period prior to the date of reference without any agreement or right in law to claim such interest. It is this contention that was accepted by the learned single Judge who deleted the interest award prior to the date of the reference and held that the arbitrators had jurisdiction to award interest from the date of the reference till the date of the award. This did not affect the arbitrators's direction in the main part of the award, that interest will accrue on the amount of the award (if the said amount was not paid within 60 days) till the date of payment of decree, whichever is earlier. This part of the award was not questioned. In fact, the decree drawn up in consequence of the order of the learned single Judge, specifically directs (a) interest on the awarded amount from 6.5.1983 (date of reference) to 26.3.1984 (date of the award); (b) "thereafter, interest on the amount awarded at 11% from 27.3.1984 to 11.12.1984" (date of the decree); and (c) interest thereafter at 9% per annum. The objection of the Union in the LPA on the question of interest was only that the arbitrators had erred in awarding interest from

6.5.1983 to 26.3.1984. It is this contention that was accepted by the Division Bench. The High Court had, therefore, not decided that the contractors were not entitled to interest beyond the date of the award. This contention of the Union, therefore, fails and is rejected."

In the light of the above, it is seen that the Apex Court has approved the award of interest from the date of reference as valid one.

34. The learned counsel for the first respondent relying on the decision of the Apex Court in *Durga Ram Prasad vs. Govt. of A.P.* ((1995) 1 SCC 418), contended that the appellant is not entitled to claim any interest. The said decision by the Apex Court is rendered by referring to the relevant clause in the contract in that case relating to payment of interest, wherein there is specific prohibition from payment of interest which is not applicable with regard to the claim relatable to the breach on the part of the first respondent.

35. Even though the Apex Court in its decision rendered in *Secretary, Irrigation Department, Govt. of India vs. G.C.Roy* (AIR 1992 SC 732) by overruling the earlier decision rendered in *Executive Engineer Irrigation, Galimala vs. Abnaduta Jena* (AIR 1988 SC 1520) has held that the Arbitrator is entitled to award interest pendente lite. In the said decision, the Apex Court has held as here-under:-

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

- (i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of S.34, C.P.C., and there is no reason or principle to hold otherwise in the case of arbitrator.
- (ii) an arbitrator is an alternative form for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties, if the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.
- (iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to S.41 and S.3 of Arbitration Act illustrate this point). All the same, the agreement must be in conformity with law. The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. *Thawardas* (AIR 1955 SC 468) has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until *Jena's case* (AIR 1988 SC 15 20) almost all the Courts in the country had upheld the power of the arbitrator to award interest pendente lite.

Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

44. Having regard to the above considerations, we think that the following is the correct principle which should be followed in this behalf.:

45. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.

46. For the reason aforesaid we must hold that the decision in *Jena* (AIR 1988 SC 1520), in so far as it runs counter to the above proposition, did not lay down correct law."

36. A perusal of the principles laid down by the Apex Court in the above decision makes it clear that the Arbitrator is entitled to award interest pendente lite which may date back to the date of reference. Admittedly, in the case on hand, the Arbitrators have chosen to award compensation in respect of claim(d), inclusive of interest by considering the fact that the appellant has incurred a loss from the date of reference. We do not see any reason to interfere with the decision of the Arbitrators in awarding interest from the date of reference and as such, we do not concur with the reasoning of the learned Judge in disallowing the claim of interest.

37. The Apex Court in its decision rendered in *State of Orissa vs. Sudhakar Das (dead) by Lrs.* (JT 2000 (2) SC 465) by following the decision rendered in *G.C.Roy's case* (supra) ((1992) 1 SCC 508) held therein

that the dispute referred to the Arbitrator included the claim of interest is no longer res-integra and stands settled in favour of the claimant and upheld the award of interest pendente lite. In the said decision, the Apex Court has even permitted the claimant to execute the decree relating to the award of

pre-reference interest also on such conditions. Thus, by applying the above principle, the appellant is entitled to claim interest in respect of claim(d) as per the award of the Arbitrators.

38. The learned senior counsel for the appellant relied on a number of decisions to the effect that the Court has no jurisdiction to interfere with the non-speaking award. We are perfectly in agreement with the said contention of the learned senior counsel to the effect that the Courts cannot lightly interfere with the non-speaking award. However, the Apex Court has clearly laid down the law, the circumstances under which a non-speaking award can be interfered with for specified reasons. In this connection, it would be appropriate to refer to the proposition of law enunciated by the Apex Court in its decision rendered in Rajasthan State Mines and Minerals Ltd. vs. Eastern Engineering Enterprises ((1999) 9 SCC 283) wherein after referring to the earlier decisions, it is held as follows:-

"44. From the resume of the aforesaid decisions, it can be stated that:

(a) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the

contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co. Ltd by relying upon the following passage from Alopri Parshad vs. Union of India which is to the following effect: (SCC p.88, para-5)

"There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an un contemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law."

In the abovesaid decision, principles (g) and (h) clearly proceed to the effect that the arbitrator cannot accept a claim which is clearly prohibited in the terms of the contract. We have already dealt with the various claims which were allowed by the arbitrators contrary to the specific prohibition contained in the relevant clauses of the contract. In the light of the above decision, we are in complete agreement with the order of the learned Judge in setting aside the several claims of the award except claim(d).

39. We are reinforced with the above views by the other decisions of the Supreme Court in Associated Engineering Co. vs. Govt. of A.P. ((1991) 4 SCC 93), the award passed in respect of the claims is liable to be set aside as the same is without jurisdiction and as such, the learned Judge has decided the matter in accordance with law. Since the jurisdiction of the Arbitrator flows as contemplated by the terms contained in the contract, if any conclusion is arrived at contrary to the express prohibition

contained in the relevant clauses of the contract, the award in respect of the said claims can be interfered with, as held by a decision of the Supreme Court in M.D., J & K Handicrafts vs. Good Luck Carpets ((1990) 4 SCC 740).

40. As regards the rejection of counter claim is concerned, we do not propose to accept the contention raised by the learned counsel for the first respondent, since the award passed by the Arbitrators based on relevant records and inspection conducted on the site, we are of the opinion that it would amount to re-appraisal of evidence, which is not permissible in law as held by the Apex Court in the decision referred to supra.

41. In the light of the above discussions, we hold that the judgment and decree of the learned Judge is perfectly valid in law except with the reasoning of the learned Judge in restricting the period for which the interest is payable viz., from the date of the award instead of from the date of reference.

42. For the reasons stated above, we modify the judgment and decree of the learned Judge to the effect that the appellant is entitled for a decree as against the first respondent for a sum of Rs.1,00,09,10 5.00 (Rupees One Crore Nine Thousand One Hundred and five only) together with the interest thereon at the rate of 11% p.a. from 22.11.1989 till the date of payment. Accordingly, OSA No.201 of 1998 is partly allowed and OSA Nos.107 and 108 of 1999 are dismissed. However, there will be no order as to costs.

Internet : Yes

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To

The Sub Asst. Registrar,
Original Side, High Court, Chennai.104.

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